LAW OFFICES
LEVENTHAL, SENTER & LERMAN
SUITE 600
2000 K STREET, N.W.
WASHINGTON, D.C. 20006-1809

TELEPHONE
(202) 429-8970

TELECOPIER
(202) 293-7783

TELEX
710-822-9260 NPL WSH

NORMAN P. LEVENTHAL
MEREDITH S. SENTER, JR.
STEVEN ALMAN LERMAN
RAUL R. RODRIGUEZ
DENNIS P. CORBETT
BARBARA K. GARDNER
STEPHEN D. BARUCH
SALLY A. BUCKMAN
LAURA B. HUMPHRIES
EVAN D. CARB
LYNN M. CRAKES
DAVID S. KEIR*

OF COUNSEL
TOBEY B. MARZOUK

* ADMITTED VA ONLY

November 6, 1992

BY HAND DELIVERY

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Ref: GC Docket No. 92-223

Dear Ms. Searcy:

On behalf of Infinity Broadcasting Corporation, I am transmitting an original and nine copies of its comments in the above-referenced rule making proceeding.

Should you have any questions concerning this matter, please contact the undersigned.

Very truly yours,

Dennis P. Corbett

Dennis P. Corbett

DPC:kbs
Enclosures

ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	GC Docket No. 92-223
Enforcement of Prohibitions	)	
Against Broadcast Indecency in	)	
18 U.S.C. § 1464	)	

To: The Commission

COMMENTS OF INFINITY BROADCASTING CORPORATION

Infinity Broadcasting Corporation ("Infinity"), by its attorneys, hereby submits its comments on the above-referenced Notice of Proposed Rule Making, FCC 92-445, released October 5, 1992 (the "Notice").[1/] In the Notice, the Commission requests comment on a proposal, mandated by the Public Telecommunications Act of 1991, Pub. L. No. 102-356, that would restrict to the hours between 12 midnight and 6 a.m. the broadcast of "indecent" program material (with a limited exception for public broadcast stations that end their broadcast day at or prior to midnight -- such stations would enjoy a "safe harbor" beginning at 10 p.m.).[2/] In connection with this proposal, the Commission

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1/ Infinity, through various subsidiaries, is the licensee of 11 FM and 7 AM radio stations located in the largest markets in the United States. Infinity is also participating in this proceeding as part of a group, Action for Children's Television, et al.

2/ Indecent material is defined by the Commission as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast media, sexual or excretory activities or organs." See Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991) ("ACT II"), cert. denied, 112 S. Ct. 1282 (1992).

specifically invited commenters to update the existing record "with regard to the presence of children in the viewing and listening audience." Notice at 1.

The Commission has identified "protecting unsupervised children from exposure to indecent material" as the sole compelling government interest justifying limitations on indecent speech. Action for Children's Television v. FCC, 852 F.2d 1332, 1343 (D.C. Cir. 1988) ("ACT I"). Because indecent (as opposed to obscene) speech is entitled to First Amendment protection, such speech may not be curtailed in the absence of a truly compelling government interest. See Sable Communications of California, Inc. v. FCC, 109 S. Ct. 2829, 2836 (1989) ("Sable"). Furthermore, where such a compelling interest is present, the limiting means must be "the least restrictive means to further the articulated interest." Id.

The Commission has correctly acknowledged that it has no authority "to act in loco parentis to deny children's access [to such speech] contrary to parents' wishes." ACT I, 852 F.2d at 1343. It has also observed that it "may only do that which is necessary to restrict children's access to indecent broadcasts; we may not go further so as to preclude access by adults who are interested in seeing or hearing such material." Infinity Broadcasting Corp. of Pennsylvania (Order on Reconsideration), 3 FCC Rcd 930, 937 n.47 (1987). See also Butler v. Michigan, 352 U.S. 380, 383 (1957). The Commission has likewise restrained its indecency enforcement to instances in which there is a reasonable

likelihood that children will be in the listening or viewing audience. ACT I, supra.

Last month, the Commission's Mass Media Bureau imposed monetary forfeitures of $2,000 each against three Infinity stations based on the Bureau's view that indecent material was included within a December 1988 broadcast of "The Howard Stern Show" (the "Stern Show"). See Memorandum Opinion and Order, DA 92-144, released October 23, 1992. Central to the Bureau's decision was its rejection of an Infinity-commissioned study conducted by the Gallup Organization (the "Gallup Survey"), which conclusively demonstrated that there are no unsupervised children in the audience of the Stern Show in New York City, the only market from which a complaint was received concerning the broadcast in question. The Bureau's refusal to credit Infinity's program-specific showing was squarely contrary to the decisions in ACT I and ACT II, supra. The ACT I court was critical of the Commission for looking to the composition of the total radio audience in making indecency determinations, without examining "the size of the predicted audience for the specific radio stations in question" to evaluate the potential impact of allegedly indecent broadcasts upon children. Id. at 1341 (emphasis added). The ACT II Court reiterated that the Commission needed to review and address the Court's concern with "the paucity of station- or program-specific audience data expressed as a percentage of the relevant age group population." 932 F.2d at 1510.

On March 30, 1992, in light of the constitutional limitations on the Commission's ability to channel protected speech, and following reinforcement of those limitations in ACT II, Infinity's subsidiary Sagittarius Broadcasting Corporation, licensee of WXRK(FM), New York City, requested the Commission to issue a declaratory ruling that no material aired during its broadcast of the Stern Show could be legitimately deemed "actionable" indecency, due to the Gallup Survey's conclusive evidence that unsupervised children are not among the program's New York listening audience. Because no unsupervised children listen to the Stern Show, the requisite compelling governmental interest that might otherwise justify curtailment or channeling of protected speech is absent. Sagittarius' "Petition for Declaratory Ruling," which is attached to these comments, discusses these issues in greater detail, and is directly relevant to the central question raised by the Commission in this proceeding.

In sum, it is respectfully submitted that the rule proposed in this proceeding is constitutionally infirm because, among other things, it would establish an arbitrary clock-hour restriction on "indecent" broadcasts, while ignoring the audience composition for specific stations and programs, contrary to the Court's directive in ACT I, and would severely limit the access

of adults to such protected speech, contrary to the Supreme Court's teaching in Sable.

Respectfully submitted,

INFINITY BROADCASTING CORPORATION

By: Dennis P. Corbett

Steven A. Lerman
Dennis P. Corbett
David S. Keir

Leventhal, Senter & Lerman
2000 K Street, N.W.
Suite 600
Washington, D.C. 20006
(202) 429-8970

November 6, 1992

Its Attorneys

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)
	)
A Petition for Declaratory Ruling	)
Interpreting Current Law	)
Governing the Commission's	)
Enforcement of 18 U.S.C. § 1464	)

To: The Commission

PETITION FOR DECLARATORY RULING

Steven A. Lerman
Dennis P. Corbett
Laura B. Humphries
David S. Keir

Leventhal, Senter & Lerman
2000 K Street, N.W.
Suite 600
Washington, D.C. 20006
(202) 429-8970

March 30, 1992

Attorneys for Sagittarius
Broadcasting Corporation

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SUMMARY

Sagittarius Broadcasting Corporation requests a declaratory ruling that the broadcast of material during the Howard Stern Show cannot be deemed actionable indecency under current legal standards. Court decisions have made clear that Commission regulation of indecency is constitutionally permissible only insofar as it assists parents in the supervision of their children. Furthermore, the only court-sanctioned definition of children defines them to be persons under 12 years of age. At the same time, specific survey data gathered by the Gallup Organization demonstrates that the Howard Stern Show has no parentally unsupervised listeners under twelve years of age. Other studies indicate that children generally listen to music programming, not adult-oriented talk shows like the Stern Show, and that few children listen to radio during the 6:00 a.m. to 10:00 a.m. time period, while those who do are supervised by an adult. Given the Court of Appeals' admonishment that the Commission should consider station-specific audience data in assessing the "reasonable risk" that children will be listening to particular programming, and given the substantial chill on Sagittarius' First Amendment rights created by the uncertainty which exists in this area, Sagittarius seeks declaratory relief.

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To: The Commission

PETITION FOR DECLARATORY RULING

Sagittarius Broadcasting Corporation, licensee of FM broadcast station WXRK, New York, New York, and a wholly owned subsidiary of Infinity Broadcasting Corporation ("Infinity"), by its attorneys and pursuant to Section 5(d) of the Administrative Procedure Act, 5 U.S.C. § 554(e), and Section 1.2 of the Commission's Rules, 47 C.F.R. § 1.2, hereby respectfully requests a declaratory ruling to remove current uncertainty regarding application of the Commission's indecency standard to "The Howard Stern Show" (the "Stern Show"). The Stern Show is broadcast daily from 6 a.m. to 10 a.m., Monday through Friday, on WXRK. As demonstrated herein, even if material falling within the ambit of the generic definition of indecency were to be broadcast during the Stern Show, the broadcast of such material could not be deemed "actionable" under current, judicially-mandated legal principles because no

"reasonable risk" exists that unsupervised children are, or will be, in the listening audience of the Stern Show.

A declaratory ruling from the Commission is necessary at this time due to constitutionally-offensive chilling effects attendant to the ongoing proceeding involving the Commission and the "safe harbor" or "channeling" aspect of broadcast indecency. On March 2, 1992, the Supreme Court denied petitions for a writ of certiorari with respect to the District of Columbia Circuit Court of Appeals' decision in Action for Children's Television v. F.C.C., 932 F.2d 1504 (D.C. Cir. 1991) ("ACT II"), where the Court of Appeals unequivocally rejected a 24-hour ban on indecency and reaffirmed "channeling" principles. Even with the denial of certiorari, the history of these proceedings -- which commenced in 1987 -- makes it extremely unlikely that the Commission will resolve the matters posited in the Court of Appeals' remand orders in the near future. Moreover, even when the Commission fulfills its responsibilities on remand, given the First Amendment sensitivities involved, and the myriad media interests to be affected by the agency's prospective actions, further litigation remains a distinct possibility.

Pending the ultimate, and clearly distant, resolution of these ongoing proceedings, Commission enforcement in this area must remain faithful to existing law, which is reflected by the "channeling" principles articulated in Pacifica, as well

as the decisions of the D.C. Circuit in Action for Children's Television v. F.C.C., 852 F.2d 1332 (D.C. Cir. 1988) ("ACT I") and ACT II. Infinity seeks a declaratory ruling to clarify the status of the Stern Show under those principles in order to remove the chilling effect of uncertainty on its First Amendment rights.

A declaratory ruling is particularly appropriate not only because of the prospects for continued uncertainty due to the pendency of the "safe harbor" proceeding, but also because of the Commission's previously expressed concern that broadcasters, as a consequence of such uncertainty, should not be effectively coerced "to forego the broadcast of certain protected speech altogether." Order on Reconsideration, Infinity Broadcasting Corp. of Pennsylvania, 3 FCC Rcd 930, 937 n.47 (1987) ("1987 Reconsideration Order"), aff'd in part, vacated and remanded in part sub nom. ACT I, supra. The Commission has also suggested that "a determination in individual cases based on relevant data is theoretically the most desirable means of determining when there is no . . . reasonable risk that children may be in the audience." Id. Infinity's continued operations are subject to uncertainty which is resulting in the inability to broadcast protected speech, and, as discussed in detail below and in the

exhibits attached hereto, it has compiled the "relevant data"; accordingly, declaratory relief is necessary and appropriate.[1/]

I. BACKGROUND

Title 18, Section 1464 of the United States Code authorizes the imposition of sanctions against a party who "utters any obscene, indecent, or profane language by means of radio communication . . . ." 18 U.S.C. § 1464. The Communications Act authorizes the Commission to implement this statute in its regulation of broadcast stations. 47 U.S.C. §§ 312(a)(6), 312(b)(2) & 503(b)(1)(D).

Although the statute on its face draws no distinction between obscenity and indecency, Constitutional considerations have required limitations on the prohibition of indecent speech. Thus, while obscene speech is accorded no

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1/ There is pending before the agency a Notice of Apparent Liability for Forfeiture issued by the Mass Media Bureau on November 29, 1990 (Letter to Mel Karmazin, 5 FCC Rcd 7291 (Mass Media Bur. 1990)) and relating to a December 16, 1988 broadcast originated on Station WXRK(FM), New York, New York. On February 11, 1991, Infinity submitted a response to the NAL, which was supplemented on June 7, 1991 to address the impact of the ACT II decision on the preliminary findings made in the NAL. Grant of the relief requested herein could moot the issues being litigated in the NAL and would also provide guidance to Infinity for other broadcasts. On the other hand, disposition of the NAL would not necessarily moot the issue focused upon in this Petition unless such disposition is based upon the "channeling" grounds posited herein. Accordingly, the Commission may wish to withhold action on the NAL until the more fundamental question isolated in this Petition is resolved.

Constitutional protection, indecent speech is protected by the First Amendment, and therefore may be regulated only to the extent that a compelling governmental interest is promoted, and the least restrictive means available are employed to further the articulated interest. Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115, 126, 109 S. Ct. 2829, 2836 (1989) ("Sable"). Consequently, distinctions between "obscene" and "indecent" broadcast material have taken on critical significance, and it has become the task of the Commission and the courts to distinguish between these two categories of speech. The definitions have evolved in case law over the last twenty years.

In 1970, for example, the Commission's definition of indecency closely resembled the Supreme Court's definition of obscenity -- i.e., material that is (1) patently offensive by contemporary community standards, and (2) utterly without redeeming social value. Eastern Education Radio, 24 F.C.C.2d 408, 412 (1970). At that time, the sole distinction between obscenity and indecency was the absence from the indecency definition of any requirement that the material appeal to "a prurient interest in sex," the keystone element for an obscenity finding. See A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of the Commonwealth of Massachusetts, 383 U.S. 413, 418 (1966).

Indecency began to take on a more particularized meaning with the Commission's 1975 ruling that comedian George Carlin's "Filthy Words" monologue was indecent "as broadcast." There, the Commission analogized the principles governing indecency regulation to those applicable to public nuisances, observing that "[n]uisance law generally speaks to channeling behavior more than actually prohibiting it." Pacifica Foundation, 56 F.C.C.2d 94, 98 (1975) (emphasis in original)("Pacifica 1975"). In making this observation, the Commission expressed the desire to "avoid the error of overbreadth" and, to that end, deemed it important to define whom the Commission sought to protect, and from what it was protecting them. Thus, the Commission concluded that indecency was not so much a matter of inherent lack of value, as it had found in 1970, but one of inappropriate context -- i.e., circumstances that would expose children to language or depictions that most parents would consider inappropriate for them to view or hear. With these principles in mind, the Commission adopted the so-called "generic" definition of indecency:

> [T]he concept of "indecent" is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.

Id. The Supreme Court upheld the Commission's action in F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978) ("Pacifica").[2/] However, the Court strongly emphasized the narrowness of its holding, basing its approval of the Commission's action on the specific circumstances of the case before it. Id. at 750.

Indeed, the Court stressed that the Commission's nuisance rationale, because of its focus on context, requires reasoned analysis of a "host of variables" in each case to determine whether particular program matter is indecent. These variables included not only the time of day, upon which the Commission had focused, but also "[t]he content of the program in which the language is used" and the effect of such content on the composition of the audience. Pacifica, 438 U.S. at 750 & n.29.[3/]

Within weeks after the Supreme Court's decision in Pacifica, the Commission itself announced that it intended to

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2/ The principal difference between the definition articulated by the Commission in Pacifica 1975 and that currently used is the removal of time-of-day from the initial indecency determination. Currently, the time of broadcast is relevant only to a determination of whether an otherwise indecent broadcast is "actionable." See 1987 Reconsideration Order, supra, at 932 n. 19.

3/ By way of example, the Court remarked in a footnote that a recitation of Chaucer's "A Miller's Tale," even in prime time, "would not be likely to command the attention of many children who are both old enough to understand and young enough to be adversely affected" by its more bawdy passages. Id.

engage in restrained enforcement, in recognition of the narrowness of the Court's holding. Its future regulation in the area, it stated, would focus upon the repetitious use of the particular words at issue in Pacifica (seven words generally pertaining to excretion, human anatomy, and sexual activity). See WGBH Educational Foundation, 69 F.C.C.2d 1250, 1254 (1978).

Under this standard, the Commission took virtually no adverse action against broadcasters on indecency grounds for nearly a decade. However, the Commission abruptly changed course in the Spring of 1987, when it declared that henceforth indecency allegations would be assessed under the generic standard and would no longer be limited to the repetitious use of the specific expletives at issue in Pacifica. See Pacifica Foundation, Inc., 2 FCC Rcd 2698 (1987) ("Pacifica 1987"); Infinity Broadcasting Corp. of Pennsylvania, 2 FCC Rcd 2705 (1987) ("Infinity Pennsylvania"); The Regents of the University of California, 2 FCC Rcd 2703 (1987) ("Regents").

Moreover, the Commission further restricted the "safe harbor" hours during which indecent broadcasts would be considered nonactionable. Previously, the Commission had presumed that material broadcast after 10:00 p.m. was sufficiently "channeled" to protect children from harm. In Pacifica 1987, however, the Commission stated its determination "that mechanistically relying on a specific time for

broadcasting indecent material no longer satisfies the requirement that indecent material be channeled to a time when there is not a reasonable risk that children may be present in the broadcast audience." Pacifica 1987 at 2699-700.

Finally, in all three cases, the Commission utilized statistics quantifying marketwide listenership among 12-17 year olds in an effort to demonstrate that "children" were in the audience of the programs at issue. The Commission provided no explanation for using these statistics, which had the effect of expanding the boundary of the protected age group from persons under twelve to persons under eighteen. Similarly, the Commission gave no reason for its refusal to consider the audience composition for specific stations or programs in order to determine the likelihood that unsupervised children would be listening or watching. See Pacifica 1987 at 2699 & 2702 n.5; Infinity Pennsylvania at 2706 & 2707 n.14; Regents at 2704 n.10.

These radical alterations in Commission policy were challenged in ACT I. In oral argument before the Court of Appeals, the Commission's General Counsel unequivocally stated that the new, more restrictive channeling policy was not motivated by an independent Commission interest in protecting children from indecent broadcasts separate from the purpose of assisting parental discipline. The intended purpose of the regulations, counsel explained, "is the interest in protecting unsupervised children from exposure to indecent material; the

government does not propose to act in loco parentis to deny children's access [to such material] contrary to parents' wishes." ACT I, 852 F.2d at 1343 (emphasis in original).[4/]

Observing that the Commission's decision in Pacifica 1975 contained "limiting conditions" focusing upon the repetition of certain words, the ACT I Court stated that the broader application of the generic indecency standard proposed by the Commission in Pacifica 1987 required careful review "in light of the sole purpose" of indecency enforcement asserted by the Commission -- i.e., assisting parents who wish to shelter their children from language they consider inappropriate for them. ACT I, 852 F.2d at 1337 and 1340. Subjecting the cases at issue to this constitutionally-required scrutiny, the D.C. Circuit upheld the Commission's broader application of its generic definition of indecency, but found that the

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4/ Such an approach is clearly not compatible with a total ban on indecent speech. Complete suppression would substitute the government's judgment not only for parents' decisions concerning what their children should view or hear, but would also limit, by governmental fiat, the choices available to adults. As the Supreme Court reiterated in Sable, such an approach paints with too broad a brush, abridging the free speech rights of adults "by allowing them to read [or see or hear] only what was acceptable for children." Sable, 109 S. Ct. at 2836 (citing Butler v. Michigan, 352 U.S. 380, 383 (1957)). Indeed, the Commission subscribed to the same view in its 1987 Reconsideration Order: "We may only do that which is necessary to restrict children's access to indecent broadcasts; we may not go further so as to preclude access by adults who are interested in seeing or hearing such material." 3 FCC Rcd at 931.

Commission's stated bases for altering the channeling criteria were "more ritual than real." Id. at 1341. It therefore concluded that the Commission had tread "an arbitrary course," both in determining what age group should be protected, and what constituted an appropriate "safe harbor" period. Id.

More particularly, the ACT I court observed that the Commission had inappropriately emphasized the composition of the total radio audience for the time periods in question, rather than "the predicted audience for the specific radio stations in question." Id. (emphasis added). The court stated that the Commission could not simply assume that daytime broadcasts could not qualify for "safe harbor" status, and advised that the agency "would be acting with utmost fidelity to the first amendment were it to reexamine, and invite comment on, its daytime, as well as evening, channeling prescriptions." Id.

Also unacceptable to the court was the Commission's adoption, without explanation, of a definition of "children" extending to teens from ages 12 to 17. Id. The court observed that inclusion of teenagers in the protected category conflicted with the Commission's historical determination that the age of twelve was an appropriate cut-off for Commission concern. Id. at 1342 (citing FCC Legislative Proposal, 122 Cong. Rec. 33,359, 33,367 n.119 (1976)). Thus, in light of the ACT I remand order, no court has sanctioned broadcast indecency

regulation which is based upon the asserted need to protect persons twelve and older. Any expansion of the protected class of "children" would require a record that has not even been developed, much less judicially approved. See ACT II, 932 F.2d at 1510 (requiring the Commission to re-examine the "appropriate definitions of 'children' and 'reasonable risk'" on remand).

In sum, because the sole constitutionally-permissible basis for indecency regulation is the assistance of parental supervision of children, both the Supreme Court and the D.C. Circuit Court of Appeals have stressed the need to examine whether unsupervised children under twelve are likely to be in the listening audience for a station or a particular program, based on both the timing of the broadcast and its appeal to children, before the broadcast of "indecent" material may be deemed actionable. See Pacifica, 438 U.S. at 750 n.29; ACT I, 852 F.2d at 1341. Thus, where a program has no unsupervised child audience, no action against arguably indecent material can be legitimately pursued. Infinity hereby respectfully requests a ruling that the Stern Show is such a program, based on the factual showing set out below.

II. REQUEST FOR RELIEF

As noted above, final and definitive judicial rulings on the appropriate bounds of indecency enforcement are likely to take several years. However, for the foreseeable future, indecency regulation will continue to be governed by the principles established in Pacifica, ACT I and ACT II. In particular, ACT I and ACT II establish that, absent a clear and compelling articulation of a legally acceptable rationale for expanding the protected age group, the definition of children for purposes of indecency enforcement is and shall remain limited to persons under twelve.

Furthermore, it also is incumbent upon the Commission to determine what level of potential child listenership actually constitutes a "reasonable risk" for channeling purposes. For example, in ACT I, the court questioned the Commission's apparent concern with a level of exposure to teens who constituted "at most 4.3 percent of the age group population" in the area surveyed. ACT I, 852 F.2d at 1342 and n.17. In addition, the Commission is required to examine "station- or program-specific audience data" in order to assess the likelihood that unsupervised children will be listening or viewing a particular program. See ACT I, 852 F.2d at 1341-1344; ACT II, 932 F.2d at 1510.

Infinity has successfully quantified the risk that unsupervised children will be listening to the Stern Show. Based upon considerable statistical evidence assembled by Infinity from several recognized and respected sources, it is respectfully submitted that even if indecent matter were broadcast during the Stern Show, it would not be actionable under current law because no "reasonable risk" exists that unsupervised children will be in the program's audience.[5/]

In particular, studies conducted by distinguished national research firms definitively demonstrate that: (1) unsupervised children do not listen to the Stern Show in the New York area; (2) children generally are not inclined to listen to live, adult-oriented talk programming such as the Stern Show; (3) children are unlikely to be present in the radio

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5/ It should be emphasized that Infinity does not believe that the Stern Show contains any indecent matter, even under the generic standard reluctantly approved by the Court in ACT I. Moreover, should the Commission grant the relief requested herein, Infinity has no intention of changing its policies so as to permit the broadcast of indecent matter on WXRK or any of its other stations. However, Infinity's intentions do not obviate the need for the relief requested herein, because the continuing threat of litigation over the question of whether certain material is or is not indecent will have a substantial chilling impact on Infinity's operations until this fundamental issue is resolved. By way of example, notwithstanding the fact that Infinity firmly believes that the material at issue in the pending NAL (see footnote 2, supra) is not indecent, the enormous cost and duration of that proceeding -- which relates to a December, 1988 broadcast -- have had a substantial chilling impact on its operations.

listening audience during the 6 a.m. to 10 a.m. time period; and (4) children who are in the listening audience during the 6 a.m. to 10 a.m. time period are supervised by an adult.

A. Gallup Survey

In view of the limited data concerning the listening habits of persons under the age of twelve,[6/] WXRK commissioned the nationally known Gallup Organization to conduct a survey of New York area households with one or more children between the ages of six and eleven. Consistent with Infinity's expectations, the Gallup survey shows that virtually no children are present in the WXRK listening audience between 6:00 a.m. and 10:00 a.m. and that no unsupervised children listen to the Howard Stern Show. More particularly, in 99.6 percent of the households surveyed -- which collectively include 99.7 percent of the children (ages six to eleven) in the survey sample -- it was reported that children do not listen to the Stern Show. In the sole household reporting a child who listened to the program, the child listener was under adult supervision. The Gallup survey is attached hereto as Exhibit A.

6/ Data from Arbitron (applicable to both radio and television), Nielsen (applicable only to television) and the former Birch/Scarborough (applicable only to radio) measure listening or viewing of persons twelve years and older.

B. 1986 Arbitron Survey

These Gallup survey results are entirely consistent with other available research demonstrating that relatively few children listen to radio between 6:00 a.m. and 10:00 a.m. For example, a special 1986 Arbitron study conducted in the Los Angeles and Cincinnati metropolitan areas showed that, of more than 400 children ages six through eleven, only 7.9 percent listened to the radio during morning drive time when school is in session, and only a slightly higher percentage, 8.1 percent, listened during the summer months. See Exhibit B hereto at 9.

C. Christenson and DeBenedittis Findings

Further, an often-cited study of children in the first through fifth grades reveals that when children do listen to the radio, they strongly prefer programming which has musical content.[7/] Eighty-three percent (83%) of the children interviewed for the study indicated that music was "what they liked" most about radio. Id. at 32. The Stern Show, however, is a talk program that rarely contains any music. Thus, the program would not be expected to appeal to a child audience, and obviously does not, as the Gallup survey demonstrates.

7/ Christenson and DeBenedittis, "'Eavesdropping' on the FM Band: Children's Use of Radio," 36 Journal of Communication 27 (Spring 1986). See Exhibit C hereto.